No. 79-6423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,
Petitioner,

vs.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,
Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

On Writ of Certiorari to the North Carolina Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Legal Aid and Defender Association (hereinafter referred to as "NLADA") respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

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The interest of NLADA in this case arises from NLADA's unique role vis-a-vis the interests of indigent persons. NLADA is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel because of their indigency. Its members include the great majority of legal services agencies throughout the United States, as well as public defender offices, coordinated assigned counsel systems, and private practitioners.

NLADA joins petitioner in seeking reversal of the decision of the North Carolina Court of Appeals holding that petitioner's constitutional rights were not violated by the trial court's failure to appoint counsel for her in a termination of parental rights proceeding. Because the primary purpose of NLADA is to ensure that the poor have access to equal justice, and because the members of NLADA represent many indigents in all kinds of proceedings, including those involving termination of parental rights, NLADA has a unique perspective from which to present to this Court arguments concerning the need and importance of counsel in these proceedings and the inability of legal services programs to meet the needs of indigent parents in such proceedings.

Respectfully submitted,

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On Writ of Certiorari to the North Carolina Court of Appeals

BRIEF FOR AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

INTEREST OF THE AMICUS

The National Legal Aid and Defender Association (hereinafter referred to as "NLADA") is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel

because of their indigency. Its members include the great majority of free legal services agencies throughout the United States, as well as public defender offices and coordinated assigned counsel systems. NLADA also includes two thousand individual members, most of whom are private practitioners.

NLADA joins petitioner in seeking reversal of the decision of the North Carolina Court of Appeals which held that the constitutional rights of petitioner, an indigent person, were not violated by the trial court's failure to appoint counsel for her in a proceeding which resulted in the termination of her parental rights. Because the primary purpose of NLADA is to ensure that the poor have access to equal justice, NLADA, on behalf of the many clients of its members, has a unique interest in ensuring that poor persons obtain appointed counsel in termination of parental rights proceedings. This is especially true since the limited resources of NLADA members make it impossible for them to represent all indigent parents in need of counsel. NLADA has an interest in protecting the rights of clients and potential clients of member programs and in ensuring that they are denied no rights because of their proverty. NLADA therefore submits this brief in support of poor persons' rights to appointed counsel in termination of parental rights proceedings.

SUMMARY OF ARGUMENT

Indigent parents who are subjected to proceedings in which the state seeks to terminate their parental rights must be provided court appointed counsel at public expense. Appointed counsel is critical to a trial that comports with the concern for basic fairness inherent in a system of due process of law.

The family unit is "perhaps the most fundamental social institution of our society." *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). Because the integrity of the family unit is of such importance, it is protected from state interference as a

liberty interest under the Due Process Clause of the Fourteenth Amendment.

Inasmuch as the parent-child relationship is a protected liberty interest, that relationship can be severed by action of the state only in the presence of certain procedural safeguards. Procedural due process requires appointment of counsel at trial for those parents who cannot afford to hire counsel. The parents' interest, the right to family integrity, is fundamental under our scheme of protected liberties. The appointment of counsel is crucial to the protection of the parents' liberty interest, and, absent appointed counsel, there is a tremendous risk that termination of parental rights will erroneously occur. On the other hand, the sole cognizable state interest in preventing the appointment of counsel is to save governmental resources, primarily money. This state interest is an insufficient justification to override the fundamental rights of parents.

In the criminal law context, this Court has found the appointment of counsel for indigent defendants to be critical to the protection of cherished liberties. The impact of a civil proceeding where the result is total and permanent loss of one's children is no less serious than the impact of most criminal proceedings on personal liberty.

Finally, the failure of this Court to recognize a constitutionally based right to appointed counsel will inevitably result in large numbers of parents being deprived of one of our most cherished liberties without the protection of legal representation. The present resources for providing no-cost representation to poor parents faced with termination of parental rights proceedings are inadequate to assure that all, or even most, will be represented.

Accordingly, the decision of the North Carolina Court of Appeals denying a right to court appointed counsel for indigent parents in termination of parental rights proceedings is incorrect and contrary to the decisions of this Court and must be reversed.

ARGUMENT

I. PARENTS' INTERESTS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS ARE LIBERTY INTERESTS ENTITLED TO THE HIGHEST PROTECTION UNDER THE DUE PROCESS CLAUSE

The appeal in this cause concerns complete and irrevocable termination of an indigent parent's interests in her child, and whether the Due Process Clause of the Fourteenth Amendment required that counsel be appointed for her in the termination hearing. It is axiomatic that procedural due process protections must be afforded only if a liberty or property interest is present. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). The interests destroyed by a termination of parental rights proceeding are liberty interests entitled to the highest protection.

This Court has noted that the family is "perhaps the most fundamental social institution of our society." *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). A termination of parental rights proceeding, present in sundry forms in every state, destroys that fundamental social institution.[1]

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[1] A representative sampling of state termination of parental rights standards can be found by examining, *e.g.*, ARIZ. REV. STAT. §8-532, *et seq.*; CAL. CIV. CODE §232, *et seq.* (West); COLO. REV. STAT. §19-11-101, *et seq.*; CONN. GEN. STAT. §17-43(a), *et seq.*; DEL. CODE ANN. tit. 13 §110, *et seq.* (1978 Supp.); D.C. CODE ANN. §16-2353, *et seq.* (1978 Supp.); GA. CODE ANN. §24A-3201, *et seq.* (1980 Supp.); HAWAII REV. STAT. §571-61, *et seq.* (1975 Supp.); IDAHO CODE §16-2001, *et seq.*; IND. CODE §31-6-5-1, *et seq.* (1980 Supp.); IOWA CODE ANN. §232.109, *et seq.* (1980 Supp.) (West); KY. REV. STAT. §199.60, *et seq.* (1980 Supp.); MINN. STAT. ANN. §260.221, *et seq.* (1980 Supp.) (West); MO. ANN. STAT. §211.447, *et seq.* (1980 Supp.) (Vernon).

The result is both final and irrevocable. If parents have their rights terminated they lose all their rights and interests in the children involved. Thus, not only are their custodial rights removed, but all other rights, duties and responsibilities emanating from the parent and child relationship are severed. The parents are left in the position as if they had never had the children. And, of course, the children are left as if they had never had natural parents.[2] Thus, the termination decision sounds the death knell for the relationship. While the legal effects of the termination can be described briefly, the actual ramifications of the termination of parental rights are devastating for all parties involved, including the children. It is certainly not exaggeration to describe the forced break-up of this most fundamental of all human relationships as worse than most terms of incarceration. *See* part II, *supra*. It is therefore to be expected, that when the state intrudes upon the family relationship, and separates parent and child, the "effect on the child's developmental progress is invariably detrimental."[3] The developmental scarring, which is most

[2] For example, the Indiana termination of parental rights statute, IND. CODE §31-6-5-1, *et seq.* (1980 Supp.), explicitly lays out the dire consequences emanating from the judicial decision to terminate parental rights.

> When the juvenile court terminates the parent-child relationship, all rights, powers, privileges, immunities, duties, and obligations (including any rights to custody, control, visitation, or support) pertaining to that relationship are permanently terminated, and the parent's consent to the child's adoption is not required.

IND. CODE §31-6-5-6(a) (1980 Supp.).

[3] J. Goldstein, A. Freud and A. Solnit, BEFORE THE BEST INTERESTS OF THE CHILD 9 (1979) (footnote omitted). The social scientists, social workers, psychologists and psychiatrists operating in this area acknowledge the fact that:

> the biological family of father, mother and their children constitutes the natural means of providing family life for children, and should for that reason be fostered and preserved whenever possible.

Child Welfare League of America, STANDARDS FOR ADOPTION SERVICE 9 (Revised ed. 1978). *See Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

(Footnote continued on following page)

likely to occur to children separated before the age of six, with the exception of the newborn, can take the form of a wide range of psychological problems, e.g., 1. a freezing of personality development at the point of separation; 2. an excessive distrust of people and a reluctance or inability to enter into close relationships; 3. self defeating behavior; or, 4. a tendency of the child upon reaching adulthood, to reproduce the problems in her own children.[4] Even where a family might appear to be one needing state intervention,

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continued

The desire to protect the natural family whenever possible stems from more than a general feeling that parents and children should be together. It stems from a professional recognition that the severence of the relationship can gravely and permanently harm not only the parents, but the child.

> It is becoming increasingly clear that when a child is cut off from his biological family system there is for the child, the parents, and the families involved a deep mutual sense of personal loss....[Indeed, research supports the hypothesis that] persons who experience unresolved emotional cut-offs from significant others are persons at higher risk emotionally and psychologically than those who have resolved such cut-offs.

Colon, *Family Ties and Child Placement*, 17 FAM. PRAC. 289, 290 (1978). For some:

> studies have indicated that adoptive families have unique strengths and weaknesses, not all of which operate to the child's advantage. Many researchers feel that the adopted child, no matter how secure, is bound to suffer from "geneological bewilderment": that is, he may feel a lingering sense of rejection stemming from his separation from his biological parents.

M. Benet, THE POLITICS OF ADOPTION 19 (1976). *See also* Bradley, *The Relationship of Early Maternal Separation to Borderline Personality in Children and Adolescents: A Pilot Study*, 136 AM. JOURN. OF PSYCHIATRY 424 (1979); Littner, *The Challenge to Make Fuller Use of Our Knowledge About Children*, 53 CHILD WELFARE 287 (1974); N. Littner, SOME TRAUMATIC EFFECTS OF SEPARATION AND PLACEMENT (1973); Prugh and Harlow, *"Masked Deprivation" in Infants and Young Children* in DEPRIVATION OF MATERNAL CARE 9 (World Health Organization 1962).

[4] N. Littner, SOME TRAUMATIC EFFECTS, *supra*, note 3 at 20. Littner, CHILD WELFARE, *supra*, note 3 at 288-291.

the parent-child relationship retains its fundamental importance for the family members, and the dangers inherent in termination remain.[5] Thus, a decision terminating parental rights is one with grave psychological and social ramifications, as well as grave legal consequences.

The obvious importance of the parent-child relationship has been repeatedly recognized by this Court. The Court has held that the parent-child relationship, which is obliterated by a termination of parental rights, is part of the liberty protected by the Due Process Clause. As far back as 1923, this Court recognized that the liberty in the Due Process Clause "denotes...the right of the individual to...establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Since that time the importance of the family has repeatedly been emphasized by this Court. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

It is established, then, that "the relationship between parent and child is constitutionally protected." *Quilloin*,

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[5] By its intrusion the state may make a bad siutation worse; indeed, it may turn a tolerable or even a good situation into a bad one.

> The intact family offers the child a rare and continuing combination of elements to further his growth: reciprocal affection between the child and two, or at least one, caretaking adult; the feeling of being wanted and therefore valued; and the stimulation of inborn capacities. Available alternatives too often fail to offer the whole series, and accordingly leave one or the other other part of the child's personality without developmental support. Recognition of these shortcomings should alert the law to ask in every case whether removal from an unsatisfactory home is the beneficial measure it purports to be.

J. Goldstein, A. Freud and A. Solnit, BEFORE THE BEST INTERESTS OF THE CHILD 13 (1979) (footnotes omitted). It should be noted that once parental rights are terminated there are often no real "available alternatives" and the child is left to drift without ever securing an adoptive placement. *See* note 9, *infra*.

434 U.S. at 255.[6] The constitutional rights implicit in this relationship have been found to emanate from the Due Process Clause, the Equal Protection Clause, and the Ninth Amendment. *Meyer v. Nebraska*, 262 U.S. at 399; *Skinner v. Oklahoma*, 316 U.S. at 541; *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). Generally, the right to family integrity is described as being subsumed in the "right of personal privacy." *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977).[7] The rights included within the zone of privacy protecting each person must be described as "'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)." *Roe v. Wade*, 410 U.S. at 152. As a fundamental right, the interests existing between a parent

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[6] The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential", *Meyer v. Nebraska*, 262 U.S. 390, 399...(1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541...(1942), and "[r]ights far more precious...than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Indeed, only last term this Court noted that:

> the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also freedom of personal choice in certain matters of marriage and family life.

Harris v. McRae, _____ U.S. _____, 100 S.Ct. 2671, 2686 (1980) (footnote omitted).

[7] "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution....Those decisions...make it clear that the right has some extension to activities relating to...family relationships...and child rearing and education." *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

and child are not only entitled to cognizance under the Due Process Clause, but are also entitled to the highest protections afforded under the Constitution. *Id.* at 156.[8]

II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT COUNSEL BE APPOINTED AT PUBLIC EXPENSE TO REPRESENT AN INDIGENT PARENT IN A TERMINATION OF PARENTAL RIGHTS PROCEEDING

The fact that due process must accompany the attempts by the state to terminate the relationship between parent and child does not resolve the more difficult question of the extent to which procedural protections must be made available in such cases. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895

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[8] The Court in *Roe*, 410 U.S. at 155 noted that:

> [w]here certain "fundamental rights" are involved the Court has held that regulation limiting these rights may be justified only by a "compelling state interest"...and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

Various state courts have characterized the parent's interest in the most compelling terms: "...more precious to many people than the right of life itself." *In re Luscier*, 84 Wash.2d 135, 524 P.2d 906, 908 (1974); "...a sanction more severe than imprisonment." *State ex rel. Lemaster v. Oakley*, 203 S.E.2d 140, 144 (S.Ct. W.Va. 1974); *Danforth v. State Department of Health and Welfare*, 303 A.2d 794, 800 (S.Ct. Me. 1973); "...one of the most drastic actions the State can take against its inhabitants." *State v. Jamison*, 251 Or. 114, 444 P.2d 15, 17 (1968).

See also In re Appeal in Pima County, Juvenile Action No. J-46735 v. Howard, 112 Ariz. 171, 540 P.2d 642 (1975); *Regenold v. Baby Fold, Inc.*, 68 Ill. 2d 419, 369 N.E.2d 858 (1977), *appeal dismissed*, 435 U.S. 963 (1978); *In re Brehm*, 3 Kan.App.2d 325, 594 P.2d 269 (1979); *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976); *Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1976); *In re Welfare of Myricks*, 85 Wash.2d 252, 533 P.2d 841 (1975).

(1961). *See also Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). This Court has consistently followed a three-pronged analysis in determining how much process is due under the Fourteenth Amendment where protected liberty interests are at stake:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See also Parham v. J.R.*, 442 U.S. 584, 599-600 (1979); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 848-849 (1977). The application of this tripartite test to termination of parental rights demonstrates that court appointed counsel at public expense for indigent parents is an essential, constitutionally required aspect of due process of law.

First, the private interest at stake in a termination of parental rights proceeding is the parental right to care, custody and companionship of minor children. The parents' interest is among the most fundamental recognized by our society and by our legal system. *See* part I, *supra*.

The interest of the state in termination of parental rights proceedings is qualitatively less substantial than the parents' interest. While the precise authority for termination of parental rights varies somewhat from jurisdiction to jurisdictioin, the basic concern of the state is

to make provision, in its *parens patriae* capacity, for those children who are bereft of parental care for any reason, whether it be absence, neglect or abuse. However, there is no guarantee that a child whose biological parents' rights are terminated will end up in a secure, stable placement.[9]

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[9] Not all children whose parental rights are terminated are readily adoptable. There are many hard to place children, particularly older children, minority children and children with handicaps, who remain in institutions and foster homes even after they have been freed for adoption by termination of parental rights proceedings. *See* A. Kadushin, CHILD WELFARE SERVICES 582-595 (2d ed. 1974); New York City Comptroller's Office, THE CHILDREN ARE WAITING: THE FAILURE TO ACHIEVE PERMANENT HOMES FOR CHILDREN 7 (1977); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 673-674 (1976). One group has estimated that "[a]t least 100,000 children wait for families because finding homes for children who are older or who have physical or other handicaps has for a variety of reasons been fraught with difficulties." Child Welfare League of America, STANDARDS FOR ADOPTION SERVICE 8-9 (Rev. ed. 1978). Recent literature shows that children in the foster care system tend to remain in foster placements for inordinately long periods of time. *See* Children's Defense Fund, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE 30-33 (1978); Fanshel, *Status Changes of Children in Foster Care*, 55 CHILD WELFARE 143, 144-45 (1976); Fanshel, *The Exit of Children From Foster Care: An Interim Research Report*, 50 CHILD WELFARE 65, 66-67 (1971); A. Kadushin, *supra* at 454-455; H. Maas and R. Engler, CHILDREN IN NEED OF PARENTS (1959); Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 (3) LAW AND CONTEMP. PROBS. 226, 273-277 (1975); Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 610-613 (1973); New York City Comptroller's Office, *supra* at 7-12; Rein, Nutt and Weiss, *Foster Family Care: Myth and Reality* in CHILDREN AND DECENT PEOPLE 37-39 (Schorr ed. 1974); E. Shermin, R. Neuman and A. Shyne, CHILDREN ADRIFT IN FOSTER CARE: A STUDY OF ALTERNATIVE APPROACHES 3 (1973); Wald, *supra* at 662-663 (1973). *See also Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 835-836 (1977). For example, in New York City alone, of children in foster care, adoption is the objective for 22.3% of the children, and yet only 3.9% of the children in care are in preadoptive or adoptive homes. The mean length of time for children in foster care in New York

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Thus, the state interest in establishing permanent, adequate homes for children is by no means co-extensive with its efforts to terminate parental rights.[10]

The abstract interest of the state in providing stable placements for children must be examined in the context of the procedure in question in order to determine the significance of the procedure from the state's perspective. When the right to court appointed counsel is viewed from the state's perspective, it is clear that the state's interest is enhanced by the procedure in question or at a minimum falls into insignificance. Without question, the state has no legitimate, cognizable interest in terminating the rights of parents who do not come within the scope of the appropriate statutory standards for terminating parental rights. In fact, the state has an affirmative obligation to make efforts to provide for the reunification of the natural

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City is five years. Citizens' Committee for Children of New York, Inc., THE CITY AND ITS CHILDREN: A VIEW OF HOW NEW YORK SERVES ITS CHILDREN IN 1979 45-48 (1980).

Additionally, children in foster placements do not necessarily experience continuity of care, but may be, and frequently are, shifted from short-term placement to short-term placement, with little regard for the child's need for stable relationships. *See* Children's Defense Fund, *supra* at 40-41; A. Kadushin, *supra* at 457, 462; Mnookin, *Child Custody Adjudication*, *supra* at 273; Mnookin, *Foster Care*, *supra* at 612; Wald, *supra* at 645-646, 671.

[10] Indeed, various authorities have contended that termination of parental rights should not take place unless there is a reasonable probability that an alternate, permanent placement is available for the child. In cases where no stable, alternate placement for the child can be expected, parental rights should be left intact as the natural family remains a potential future resource for the child's nurturance. *See* Wald, *supra*, note 9 at 699; American Bar Association/Institute for Judicial Administration, JUVENILE JUSTICE STANDARDS PROJECT; STANDARDS ON ABUSE AND NEGLECT §8.4(D) (1977).

family.[11] This Court has consistently recognized that under our system of adversarial jurisprudence, the presence of counsel to represent all parties interested in a proceeding contributes substantially to the accuracy of the fact-finding process and the legal conclusions to be drawn from the facts. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Douglas v. California*, 372 U.S. 353, 357 (1963); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Because of the impact counsel for all parties has upon the integrity of the court's decision-making process, appointment of counsel for parents who would otherwise go unrepresented actually has a salutary effect upon the shared interest of parents and state in avoiding erroneous terminations of parental rights.[12] Thus, while the state has an interest in assuring

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[11] 42 U.S.C. §601 provides that federal funds be made available to states which have submitted, and have had approved by the Secretary of the Department of Health and Human Services, a state plan for aid and services to needy families with children, the purpose being:

> to help maintain and strengthen family life and to help such parents or relatives to attain or retain capacity for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection....

All fifty states, including North Carolina, have elected to participate in this program. U.S. Department of Health and Human Services, CHARACTERISTICS OF STATE PLANS FOR AID TO FAMILIES WITH DEPENDENT CHILDREN UNDER THE SOCIAL SECURITY ACT TITLE IV-A (1980). *See also* 42 U.S.C. §671(a)(45) [effective October 1, 1983]; *In the Matter of Leon R.R.*, 48 N.Y.2d 117, 397 N.E.2d 374, 412 N.Y.S.2d 474 (1979); American Bar Association/Institute for Judicial Administration, *supra*, note 10 at §6.5(B)(1).

[12] The presence of counsel for the parents has a substantial impact upon the results that are achieved. A study has shown that in temporary custody proceedings brought against parents by state welfare authorities, results beneficial to the continuing unity of parent and child were highly correlated with the presence of counsel on behalf of the parents. Note, *Representation in Child Neglect Cases: Are Parents Neglected?*, 4 COLUM. J. LAW & SOC. PROB. 230, 242-243 (1968). This has led one commentator to observe:

(Footnote continued on following page)

stable and secure placements for the children in its boundaries, that interest is enhanced by court procedures that provide a safeguard against poor parents and children being unnecessarily deprived of their relationships with each other. At the very least, the state's *parens patriae* interest is totally irrelevant to the issue of court appointed counsel.

The only legitimate, cognizable interest the state has in denying counsel to parents in termination of parental rights cases is to save money and other state resources. However, this Court has consistently rejected economic considerations as adequate justification for withholding procedures necessary to protect the fundamental rights of citizens. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 265-266 (1970). Likewise, it is arguably quicker, and therefore more efficient, to terminate the rights of parents in the absence of a spirited defense put on by competent legal counsel. But considerations of efficiency hardly create a state interest of sufficient magnitude to allow the trampling of rights as important as those that make up the parent-child relationship.

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process

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> Since there is no evidence indicating that the average respondent who can retain counsel is better or less neglectful than one who cannot, the conclusion seems inescapable that a significant number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel. In other words, assuming a basic faith in the adversary system as a method of bringing the truth to light, a significant number of neglect findings (followed in many cases by a taking of the child from his parents) against unrepresented indigents are probably erroneous. It would be hard to think of a system of law that works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings.

Note, *Child Neglect: Due Process For the Parent*, 70 COLUM. L. REV. 468, 476 (1970).

> Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. at 656. Thus, when measured against the competing interests of parents, the state interest in saving funds and operating efficiently is *de minimus*.

The third aspect of due process analysis is to consider the importance of the procedure in question as a safeguard against erroneous deprivations of fundamental rights. Representation of counsel throughout a termination of parental rights proceeding is of inestimable importance in protecting indigent parents against the erroneous and ill-considered severing of the relationship between biological parent and child. Without the protection of a trained legal advocate, the probability of erroneous determinations is great.

Proceedings to terminate parental rights are extremely complex. The statutory standards for the termination of parental rights vary somewhat from state to state, but it is characteristic of these standards to require the court to make its determination on the basis of complicated factual issues that require close analysis of human behavior.[13] Indeed, this Court has recognized the importance of

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[13] *See* note 1, *supra*. The North Carolina statute, under which the petitioner's parental rights were terminated in this case, is illustrative of this point:

> The court may terminate the parental rights upon a finding of one or more of the following:
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> * * *
>
> (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years

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appointed counsel in cases where the factual determinations involved are complex. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Whether termination of parental rights is in the best interest of the child, the ultimate inquiry in any termination of parental rights proceeding, is in itself an issue of unfathomable complexity.

Often, termination of parental rights proceedings focus on such issues as the parenting skills of the parents, the medical or emotional needs of the child, the quality of the relationship between the parent and child, or the mental fitness of the parent. The adequacy of efforts by social service personnel to assist parents in alleviating unacceptable home conditions is also frequently open to inquiry in termination proceedings. These are all issues that call for, and frequently involve, the testimony of expert witnesses such as medical doctors, psychologists, and social workers, in addition to the technical records used by these professionals.[14] In this connection, the unrepresented

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> to the diligent efforts of a county department of social services, a child-caring institution or licensed child placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.
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> * * *

N.C. GEN. STAT. §7A-289.32 (1979 Supp.).

[14] *See, e.g.*, the evidence submitted to the court in *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973), which consisted primarily of the testimony of the county public assistance director and three caseworkers. *Id.*, 208 N.W.2d at 261.

> Parents most often involved in neglect and termination proceedings are usually the least equipped, in terms of intellectual and emotional resources, to respond in such proceedings.

Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55, 63-64. (1976). *See also Crist v. Division of Youth and Family Services*, 128 N.J. Super. 402, 320 A.2d 203, 210 (Law Div. 1974), *aff'd.*, 135 N.J. Super. 573, 343 A.2d 815 (App. Div. 1975).

> The indigent are frequently the least able to cope with government in its official functions. *See* Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966). The case at bar was routine for the welfare workers and other juvenile court staff. For the indigent mother, however, the entire proceedings were incomprehensible.

State v. Jamison, 251 Or. 114, 116-117, 444 P.2d 15, 17 (1968).

parent is at a two-fold disadvantage. First, it is unreasonable to expect the parent acting *pro se* to perform an adequate job of testing and probing the expert testimony of the state. The average lay person, untrained in the skills of cross-examination and having little familiarity with these areas of expertise, stands helpless before the intimidating authority of such professionals.[15] Second, the unrepresented poor parent is almost always without resources, financial or otherwise, to marshall expert testimony and documentary evidence in support of maintaining the parent-child relationship. In this connection, the facts of this case clearly demonstrate that appointed counsel is an essential of due process. Abby Gail Lassiter was imprisoned at the time of, and prior to, trial. Under those circumstances, the preparation of a meaningful defense, absent other assistance, was impossible.

The parent stands against a formidable opponent in a termination of parental rights proceeding. The state, as in this case and most such cases, is represented by counsel and has available the resources of the petitioning welfare or social services agency. These resources include the assistance of trained social workers, the funds or other means to secure documentary exhibits and the assistance of other trained professional personnel, and the sophistication to control the course of the proceedings. Also, the state has typically processed hundreds or thousands of these cases and therefore has the advantage of considerable experience at presenting any given case to a known judge in the most favorable light.

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[15] This is well illustrated by the court's observations in *State v. Jamison*, 251 Or. 114, 444 P.2d 15 (1968):

> Without counsel, the informality usually associated with ex parte hearings prevailed. The juvenile court was led to proceed on the basis of incompetent evidence and evidence that had remote, if any, connection with the issues made up by the petition.

Id., 444 P.2d at 17.

By way of contrast, the parent is generally ill-educated, poor and lacking in the skills necessary to prepare an adequate defense.[16] In a termination of parental rights proceeding, the parent is faced with the need to make evidentiary objections, cross-examine witnesses, subpoena witnesses and exhibits, and present a coherent view of the facts supporting the parent's position through competent evidence. Even to a trained attorney, these tasks stand as significant challenges. The indigent parent, faced with these insurmountable obstacles, has no chance of salvaging the legal relationship with his or her child unless the assistance of counsel is provided.

These factors point to an overwhelming disparity between the abilities of the petitioning agency and the unrepresented, natural parent to present their respective cases. The result is that the facts and the legal arguments growing out of those facts that are presented to the court will inevitably be one-sided. Therefore, given the complex nature of a termination of parental rights proceeding, it is clear that the lack of court-appointed counsel to represent the indigent parent creates a substantial risk that parental rights will be erroneously terminated.[17]

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[16] *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W. 2d 55, 63-64 (1976); *Crist v. Division of Youth and Family Services*, 128 N.J. Super. 402, 320 A.2d 203, 210 (Law Div. 1974); *State v. Jamison*, 251 Or. 114, 444 P.2d 15, 17 (Or. 1968). *See also* Jenkins, *Child Welfare As A Class Sytem* in CHILDREN AND DECENT PEOPLE 3, 11-12 (Schorr ed. 1974); Jenkins and Norman, FILIAL DEPRIVATION AND FOSTER CARE 25-30 (1972); Kay and Phillips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 733-739 (1966); Rein, Nutt and Weiss, *supra*, note 9 at 24-29. And *see generally* ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (Part I); 16 STAN. L. REV. 900 (Part II) (1964); 17 STAN. L. REV. 614 (Part III) (1965).

[17] The right of indigent parents to appointed counsel at trial in termination of parental rights cases has been established in a large number of jurisdictions by legislation or court decision. *See, e.g.*, ALA.

(Footnote continued on following page)

The right of an indigent parent to court appointed counsel at trial in a termination of parental rights proceeding is one of first impression in this Court.[18] This Court has, of course, determined that court appointed counsel is required to represent the indigent defendant in a criminal proceeding where incarceration is the disposition.

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CODE §12-15-63; CAL. CIVIL CODE §237.5 (1980 Supp.) (West); COLO. REV. STAT. §19-11-103(2); D.C. CODE ENCYCL. §16-2304 (1978 Supp.) (West); GA. CODE ANN. §24A-2001 (1976 Rev.); IDAHO CODE §16-2009; IND. CODE §31-6-7-2(b) (1980 Supp.); IOWA CODE ANN. §232.113 (1980 Supp.) (West); KAN. STAT. ANN. §38-820 (1979 Supp.); KY. REV. STAT. §199.603 (1980 Supp.); LA. CIV. CODE ANN. art. 13:1602 (1980 Supp.) (West); MINN. STAT. ANN. §260.155 (West); MO. ANN. STAT. §211.562 (1980 Supp.) (Vernon); N.D. CENT. CODE §27-20-26; N.H. REV. STAT. ANN. §170-C:10; N.Y. FAM. CT. ACT §262(a)(iv) (1976-79 Supp.); OHIO REV. CODE ANN. §2151.352; OKLA. STAT. ANN. tit. 10, §1109 (West); OR. REV. STAT. §419.498; S.D. COMP. LAWS ANN. §26-8-22.2; VA. CODE §16.1-266 (1980 Supp.); WASH. REV. CODE ANN. §13.34.090; W.VA. CODE §49-6-2; *Matter of Chad S.*, 580 P.2d 983 (S.Ct. Okla. 1978); *Crist v. Division of Youth and Family Services*, 135 N.J. Super. 573, 343 A.2d 815 (App. Div. 1975); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973); *In re R.I.*, 455 Pa. 29, 312 A.2d 601 (1973); *State v. Jamison*, 251 Or. 114, 444 P.2d 15 (1968).

Several federal courts and a number of state courts have recognized the need for court-appointed counsel even in cases where the deprivation of child custody by the state is only temporary. *Davis v. Page*, 618 F.2d 374 (5th Cir. 1980); *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974); *Smith v. Edmiston*, 431 F.Supp. 941 (W.D. Tenn. 1977); *Roe v. Conn*, 417 F.Supp. 769 (M.D. Ala. 1976) (court appointed counsel for child); *Crist v. Division of Youth and Family Services, supra; In re Welfare of Myricks*, 85 Wash.2d 252, 533 P.2d 841 (1974); *State ex rel. Lemaster v. Oakley*, 203 S.E. 2d 140 (W.Va. 1974); *In re Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

[18] During the 1979 term, this Court granted certiorari on a case raising the right to court-appointed counsel for indigent parents on appeal from a decision terminating parental rights. *Matter of Otis*, ___ U.S. ___, *100 S.Ct. 262* (1979). That case however was vacated and remanded in light of a subsequent decision of the Ohio Supreme Court in *State ex rel. Heller v. Miller*, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980). *Id.*, 100 S.Ct. 1003 (1980).

Scott v. Illinois, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). This case, and termination of parental rights cases in general, present considerations that are as compelling as in the criminal law relative to the need for court appointed counsel. In termination of parental rights cases, as in criminal cases, the state is the prosecuting party. The individual subjected to either proceeding stands against the awesome power and resources of the government. In each instance, the indigent defendant is without any meaningful resources to resist, absent the assistance of competent legal counsel. While termination of parental rights cases are deemed non-criminal, the difference between labels of "criminal" and "civil" creates no substantive distinction in and of itself. In determining the parameters of due process, this Court has always looked beyond labels to the fundamental interests at stake. *In re Gault*, 387 U.S. 1, 49-50 (1967); *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971). In the criminal context, the interest at stake is personal liberty from physical restraint. Thus, the indigent person deprived of his physical freedom for even one day is entitled to court appointed counsel. *Scott v. Illinois*, 440 U.S. 367 (1979). While a day of jail time is a substantial deprivation of personal freedom, it is hardly a greater intrusion upon liberty than the total and permanent severing of a parent's right to the custody, care and companionship of his or her children. Indeed, only lengthy incarceration surpasses termination of the parent-child relationship as a deprivation of a fundamental liberty interest. *See* part I, *supra*.

In some respects, the need for a meaningful, counsel-assisted trial is more crucial in termination of parental rights cases than in criminal cases. The loss of liberty associated with a criminal conviction is frequently temporary, whereas the loss of liberty to a parent whose parental rights have been terminated is permanent and irrevocable—the lost liberty will not be restored with time. In a criminal case, a defendant has the important additional safeguards of the highest burden of proof in the

law and a right to a jury trial. As is commonly the case, the safeguard of a jury of peers is not available to parents in North Carolina who are subjected to termination of parental rights proceedings. N.C. GEN. STAT. §7A-289.30(d) (1979 Supp.). Additionally, the criminal burden of proof was not used to terminate parental rights in this case. N.C. GEN. STAT. §7A-289.30(e) (1979 Supp.). Typically, the standard of proof is either a preponderance of the evidence or clear and convincing evidence.[19] Furthermore, in a criminal case the statutory standard of conduct against which the defendant's conduct is measured is very clear, a specific criminal act is either committed or not.[20] By way of contrast, in termination of parental rights proceedings, the facts under scrutiny are not isolated acts, fixed in time, but complicated, on-going and inevitably imprecise patterns of relationships among parent, child, social service workers and other helping professionals.

A meaningful trial is crucial to the fundamental fairness of termination of parental rights proceedings. The interests of the parent are substantially more important than the interests of the state. In fact, the deprivation of liberty that occurs when parental rights are terminated is in many respects more intrusive than that which occurs in most criminal proceedings. In the absence of court appointed counsel, the unrepresented indigent parent runs a substantial risk that that most sacred of relationships, the bond between parent and child, will be

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[19] The standard of proof in termination of parental rights proceedings is presently under review by this Court. *Doe v. Delaware*, ___ U.S. ___, 100 S.Ct. 1336 (1980) *(probable juris. noted).*

[20] Not only do criminal statutes direct themselves at concrete, socially deviant types of conduct, thus providing a basis for statutory clarity, but the vagueness doctrine has been applied to strike down those criminal statutes that do not put the person of ordinary intelligence on notice as to what behavior will run afoul of the criminal law. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

erroneously destroyed. In light of these considerations, the procedural fairness required by due process dictates that indigent parents be constitutionally entitled to court appointed counsel to provide representation at trial.

III. THERE IS CURRENTLY AN INSUFFICIENT NUMBER OF FREE COUNSEL AVAILABLE TO REPRESENT INDIGENT PARENTS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS WITHOUT JUDICIAL APPOINTMENT

The primary resources for the non-appointive legal representation of indigents in civil proceedings, such as termination of parental rights, are the legal aid programs funded by the Legal Services Corporation (hereinafter "Corporation").[21] Respondent has implied that there is no need to find a right to appointed counsel in termination of parental rights proceedings because free counsel, presumably the programs funded by the Corporation, are available. Respondent's Brief in Opposition at 4. This is erroneous for a number of reasons.

It should initially be noted, if only briefly, that such an argument is meaningless given the constitutional issue presented to this Court. Abby Gail Lassiter did not have counsel appointed for her in her termination of parental rights proceeding, despite her indigency. Her rights were subsequently terminated. The issue of whether this violated Abby Gail Lassiter's Fourteenth Amendment rights must be decided regardless of whether she could have obtained counsel through the North Central Legal Assistance Program, or through any other means. However, it is also clear that the Corporation, and its grantee programs, do not have the capability to represent all indigent parents in termination proceedings.

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[21] The North Central Legal Assistance Program, referred to in Respondent's Brief in Opposition, is funded by the Legal Services Corporation. Legal Services Corporation, ANNUAL REPORT—FISCAL YEAR 1979 33 (1980).

The Corporation was established in 1974 pursuant to an act of Congress. 42 U.S.C. §2996, *et seq.* It is a non-profit, federally chartered corporation which is charged with distributing monies appropriated by Congress to grantee organizations which are to provide free legal assistance to low income persons. 42 U.S.C. §2996; 42 U.S.C. §2996f; 42 U.S.C. §2996i. The grantee organizations provide a wide range of civil legal assistance.[22]

In fiscal year 1980, the Corporation was appropriated $300 million by Congress.[23] This money was distributed to 321 grantee programs employing 5,028 attorneys.[24] The eligibility population, according to the 1970 Census, came to 29 million persons, not including an additional 1.5 million impoverished Native Americans and migrant farm workers.[25] This breaks down to approximately two attorneys for every 10,000 eligible clients.[26] These are clients who can and do present the attorneys with problems ranging from dissolution of marriage to landlord/tenant disputes requiring resolution using methods ranging from negotiation to litigation. *See* Legal Services Corporation, ANNUAL REPORT—FISCAL YEAR 1979 15-20 (1980). It is thus not surprising that the resources of the programs are

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[22] *See* 42 U.S.C. §2996f(b) for a listing of the limitations on representation of clients by grantees.

[23] Legal Services Corporation, NEWS 3 (September, 1980).

[24] Legal Services Corporation, SELECTED FUNDING AND STAFFING CHARACTERISTICS OF FIELD PROGRAMS SUPPORTED BY THE LEGAL SERVICES CORPORATION—START OF 1980—A FACT BOOK 1 (1980).

[25] Legal Services Corporation, NEWS 2 (September, 1980). Eligiblity is based primarily on an income test with a maximum allowable income of no more than 125 percent of the Office of Management and Budget Official Poverty Line Threshold. 45 C.F.R. §1611.3(b).

[26] Legal Services Corporation, NEWS 3 (September, 1980).

strained. Indeed, a study sponsored by the American Bar Association produced data indicating that nearly 25 percent, or seven million, of the nation's poor face a civil problem each year. But Corporation grantee programs can handle less than 20 percent of these persons' legal needs.[27] Given this reality, it is impossible to argue that legal aid organizations funded by the Corporation can assume the role of representing all parents whose parental rights are sought to be terminated.

It should also be noted that the existence of the Legal Services Corporation and the grantee legal aid societies depends entirely upon continuing appropriations from Congress. If such appropriations would cease, no free legal representation could be provided in any cases, including termination of parental rights proceedings. It would certainly be shortsighted to expect that such a structure could uphold the constitutional interests involved in this cause. It is thus clear that only through judicial appointments of counsel can indigent parents in termination proceedings be assured of legal representation.

CONCLUSION

For the foregoing reasons, the judgment of the North Carolina Court of Appeals should be reversed.

Respectfully submitted,

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[27] Legal Services Corporation, NEWS 2 (September, 1980).